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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 DEUTSCHE BANK NATIONAL TRUST  
8 COMPANY,

9 Plaintiff(s),

10 v.

11 SFR INVESTMENTS POOL 1, LLC, et al.,

12 Defendant(s).

Case No. 2:17-CV-1760 JCM (CWH)

ORDER

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14 Presently before the court is plaintiff Deutsche Bank National Trust Company's ("Deutsche  
15 Bank") motion for summary judgment. (ECF No. 29). Defendant/cross claimant Sequoia  
16 Homeowners Association ("Sequoia") and defendant/cross claimant/counter claimant SFR  
17 Investments Pool 1, LLC ("SFR") filed separate responses (ECF Nos. 38, 40), to which Deutsche  
18 Bank filed separate replies (ECF Nos. 41, 42).

19 Also before the court is SFR's motion for summary judgment. (ECF No. 31). Deutsche  
20 Bank and Sequoia filed separate responses (ECF Nos. 37, 39), to which SFR filed separate replies  
21 (ECF Nos. 43, 44).

22 **I. Facts**

23 This action arises from a dispute over real property located at 8764 Timber Mesa Street,  
24 Las Vegas, Nevada 89139 ("the property"). (ECF No. 1).

25 Mosh Hamitay purchased the property on or about January 12, 2006. (ECF No. 29-1).  
26 Hamitay financed the purchase with a loan in the amount of \$348,000.00 from Option One  
27 Mortgage Corporation ("Option One"). *Id.* Option One secured the loan with a deed of trust,  
28 which names Option One as the lender and beneficiary, and Premier Trust Deed Services, Inc. as

1 the trustee. *Id.* On September 19, 2007, Deutsche Bank acquired all beneficial interest in the deed  
2 of trust via an assignment, which Deutsche Bank recorded with the Clark County recorder's office.  
3 (ECF No. 29-3).

4 On January 5, 2009, Sequoia, through its agent defendant Nevada Association Services,  
5 Inc. ("NAS"), recorded a notice of delinquent assessment lien ("the lien") against the property for  
6 Hamitay's failure to pay Sequoia in the amount of \$1,224.50. (ECF No. 29-7). On March 9, 2009,  
7 Sequoia recorded a notice of default and election to sell pursuant to the lien, stating that the amount  
8 due was \$2,262.00 as of March 4, 2009. (ECF No. 29-8).

9 On February 1, 2010, Sequoia recorded a notice of foreclosure sale against the property.  
10 (ECF No. 29-9). On October 29, 2013, Sequoia recorded a second notice of foreclosure sale  
11 against the property. (ECF No. 29-10). On November 22, 2013, Sequoia sold the property in a  
12 nonjudicial foreclosure sale to SFR in exchange for \$12,000.00. (ECF No 29-11). On November  
13 26, 2011, SFR recorded the deed of foreclosure with the Clark County recorder's office. *Id.*

14 On June 26, 2017, Deutsche Bank filed a complaint, alleging five causes of action: (1) quiet  
15 title/declaratory relief pursuant to 28 U.S.C. § 2201, NRS 30.010 *et seq.*, and NRS 40.010; (2)  
16 declaratory relief under the Fifth and Fourteenth Amendments; (3) quiet title under the Fifth and  
17 Fourteenth Amendments; (4) permanent and preliminary injunction; and (5) unjust enrichment.  
18 (ECF No. 1).

19 Now, Deutsche Bank and SFR have filed cross-motions for summary judgment, requesting  
20 that the court resolve whether foreclosure sale extinguished the deed of trust. (ECF Nos. 29, 31).

## 21 **II. Legal Standard**

22 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
23 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
24 show that "there is no genuine dispute as to any material fact and the movant is entitled to a  
25 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is  
26 "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317,  
27 323–24 (1986).

1 For purposes of summary judgment, disputed factual issues should be construed in favor  
2 of the nonmoving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to  
3 withstand summary judgment, the nonmoving party must “set forth specific facts showing that  
4 there is a genuine issue for trial.” *Id.*

5 In determining summary judgment, a court applies a burden-shifting analysis. “When the  
6 party moving for summary judgment would bear the burden of proof at trial, it must come forward  
7 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at  
8 trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine  
9 issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests.,*  
10 *Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

11 By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
12 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
13 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed  
14 to make a showing sufficient to establish an element essential to that party’s case on which that  
15 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving  
16 party fails to meet its initial burden, summary judgment must be denied and the court need not  
17 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–  
18 60 (1970).

19 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
20 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
21 *Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a dispute of material  
22 fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
23 626, 631 (9th Cir. 1987). It is sufficient that “the claimed factual dispute be shown to require a  
24 jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.*

25 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
26 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
27 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
28

1 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
2 for trial. *See Celotex*, 477 U.S. at 324.

3 At summary judgment, a court's function is not to weigh the evidence and determine the  
4 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby,*  
5 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all  
6 justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the  
7 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
8 granted. *See id.* at 249–50.

### 9 **III. Discussion**

10 Deutsche Bank and SFR filed cross-motions for summary judgment, disputing whether the  
11 foreclosure sale extinguished the deed of trust. (ECF Nos. 29, 31). Because Deutsche Bank has  
12 failed to provide sufficient grounds to set aside the foreclosure sale, the court will grant SFR's  
13 motion for summary judgment and deny Deutsche Bank's for summary judgment.

14 Under Nevada law, "[a]n action may be brought by any person against another who claims  
15 an estate or interest in real property, adverse to the person bringing the action for the purpose of  
16 determining such adverse claim." Nev. Rev. Stat. § 40.010. "A plea to quiet title does not require  
17 any particular elements, but each party must plead and prove his or her own claim to the property  
18 in question and a plaintiff's right to relief therefore depends on superiority of title." *Chapman v.*  
19 *Deutsche Bank Nat'l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (citations and internal quotation  
20 marks omitted). Therefore, a party must show that its claim to the property is superior to all others  
21 in order to succeed on a quiet title action. *See also Breliant v. Preferred Equities Corp.*, 918 P.2d  
22 314, 318 (Nev. 1996) ("In a quiet title action, the burden of proof rests with the plaintiff to prove  
23 good title in himself.").

24 NRS 116.3116 *et seq.*<sup>1</sup> ("Chapter 116") allows an HOA to place a lien on its homeowners'  
25 residences for unpaid assessments and fines. Nev. Rev. Stat. § 116.3116(1). Under NRS

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27 <sup>1</sup> The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except  
28 where otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are  
to the version of the statutes in effect in 2011–13, when the events giving rise to this litigation  
occurred.

1 116.3116(2), HOA liens have priority over other encumbrances. Nev. Rev. Stat. § 116.3116(2).  
2 However, some encumbrances are not subject to an HOA lien's priority, including "[a] first  
3 security interest on the unit recorded before the date on which the assessment sought to be enforced  
4 became delinquent." Nev. Rev. Stat. § 116.3116(2)(b).

5 Chapter 116 then provides an exception to the subparagraph (2)(b) exception for first  
6 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investments Pool 1 v. U.S. Bank*, the  
7 Nevada Supreme Court provided the following explanation:

8 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,  
9 a superpriority piece and a subpriority piece. The superpriority piece, consisting of  
10 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement  
charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all  
other HOA fees or assessments, is subordinate to a first deed of trust.

11 334 P.3d 408, 411 (Nev. 2014) ("*SFR Investments*").

12 Under Chapter 116, an HOA can enforce its superpriority lien with a nonjudicial  
13 foreclosure sale. *Id.* at 415. Thus, "NRS 116.3116(2) provides an HOA a true superpriority lien,  
14 proper foreclosure of which will extinguish a first deed of trust." *Id.* at 419; *see also* Nev. Rev.  
15 Stat. § 116.3116(1) (providing that "the association may foreclose its lien by sale" upon  
16 compliance with the statutory notice and timing rules).

17 NRS 116.3116(1) provides that when an HOA forecloses on a property pursuant to NRS  
18 116.3116(4), the following recitals in the deed are conclusive proof of the matters recited:

- 19 (a) Default, the mailing of the notice of delinquent assessment, and the recording  
20 of the notice of default and election to sell;  
21 (b) The elapsing of the 90 days; and  
(c) The giving of notice of sale[.]

22 Nev. Rev. Stat. § 116.3116(1)(a)–(c).<sup>2</sup> "The 'conclusive' recitals concern . . . all statutory  
23 prerequisites to a valid HOA lien foreclosure sale." *See Shadow Wood Homeowners Assoc. v. N.Y.*

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24  
25 <sup>2</sup> The statute further provides as follows:

26 2. Such a deed containing those recitals is conclusive against the unit's  
27 former owner, his or her heirs and assigns, and all other persons. The receipt for the  
28 purchase money contained in such a deed is sufficient to discharge the purchaser  
from obligation to see to the proper application of the purchase money.

1 *Cnty. Bancorp., Inc.*, 366 P.3d 1105 (Nev. 2016) (“*Shadow Wood*”). Nevertheless, courts retain  
2 the equitable authority to consider quiet title actions even when an HOA’s foreclosure deed  
3 contains statutorily conclusive recitals. *See id.* at 1112.

4 Here, the parties have provided the recorded notice of delinquent assessment, the recorded  
5 notice of default and election to sell, the recorded notice of foreclosure sale, and the recorded  
6 trustee’s deed upon sale. *See* (ECF Nos. 29-7, 29-8, 29-10, 29-11). Further, the recorded  
7 foreclosure deed contains the necessary recitals to establish compliance with NRS 116.31162  
8 through NRS 116.31164. (ECF No. 29-11); *See id.* at 1112. Therefore, pursuant to NRS  
9 116.31166 and the recorded foreclosure deed, the foreclosure sale was valid to the extent that it  
10 complied with NRS 116.31162 through NRS 116.31164.

11 While NRS 116.3116 accords certain deed recitals conclusive effect, it does not  
12 conclusively entitle the buyer at the HOA foreclosure sale to success on a quiet title claim. *See*  
13 *Shadow Wood*, 366 P.3d at 1112 (rejecting that NRS 116.31166 defeats, as a matter of law, actions  
14 to quiet title). Thus, the question remains whether plaintiff has demonstrated sufficient grounds  
15 to justify setting aside the foreclosure sale. *See id.*

16 “When sitting in equity . . . courts must consider the entirety of the circumstances that bear  
17 upon the equities. This includes considering the status and actions of all parties involved, including  
18 whether an innocent party may be harmed by granting the desired relief.” *Id.*

19 Deutsche Bank contends that the foreclosure sale did not extinguish Deutsche Bank’s deed  
20 of trust for two reasons: (1) Sequoia foreclosed on the property pursuant to an unconstitutional  
21 statute and (2) the foreclosure sale was commercially unreasonable. (ECF No. 29).

22 *i. Constitutionality of Chapter 116*

23 Deutsche Bank argues that the court should grant summary judgment because, under  
24 *Bourne Valley*, Sequoia foreclosed pursuant to a facially unconstitutional state statute. (ECF No.

25  
26  
27 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164  
vests in the purchaser the title of the unit’s owner without equity or right of  
28 redemption.

Nev. Rev. Stat. § 116.31166(2)–(3).

29); see *Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir. 2016) (“*Bourne Valley*”). However, Deutsche Bank’s reliance on *Bourne Valley* is misplaced.

In *Bourne Valley*, the Ninth Circuit held that Chapter 116 violated the Due Process Clause of the Fourteenth Amendment because it did not require a party foreclosing on a property to provide notice to a holder of any subordinate security interest. *Bourne Valley*, 832 F.3d at 1159. This conclusion was based on the interpretation that NRS 116.31168(1) did not incorporate NRS 107.090, which requires notice of default to any person with a subordinate security interest. *Id.*

When the Ninth Circuit ruled in *Bourne Valley*, there was no authority on the interpretation of NRS 116.31168(1). Left with the general doctrines of statute interpretation, the court declined to incorporate NRS 107.090 on the grounds that it would render NRS 116.31168(1) superfluous. *Id.* (citing *S. Nev. Homebuilders Ass’n v. Clark Cnty.*, 117 P.3d 171, 173 (2005)).

Since the Ninth Circuit’s decision in *Bourne Valley*, the Nevada Supreme Court has provided its interpretation of Chapter 116, holding that NRS 116.31168(1) does incorporate NRS 107.090. *SFR Invs. Pool 1, LLC v. The Bank of N.Y. Mellon*, 422 P.3d 1248, 1252 (Nev. 2018) (expressly refuting *Bourne Valley*). Under this ruling, NRS 116.31168(1) requires notice to subordinate interest holders and, thus, does not violate the Fourteenth Amendment. *Id.*

Both the Ninth Circuit and the Supreme Court have recognized, “a [s]tate’s highest court is the final judicial arbiter of the meaning of state statutes.” *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006) (citing *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975)); see also *Knapp v. Cardwell*, 667 F.2d, 1253, 1260 (9th Cir. 1982) (“State courts have the final authority to interpret, and, where they see fit, to reinterpret the states’ legislation.”). Accordingly, this court will follow the Nevada Supreme Court’s decision and hold that Sequoia foreclosed on the property pursuant to a constitutional statute.

ii. *Commercial reasonability*

Sequoia and SFR argue that the foreclosure sale was commercially reasonable because the sale price (\$12,000.00) was not grossly inadequate given the conditions under which the property was sold and because Deutsche Bank has not presented any evidence of fraud, unfairness, or oppression. (ECF Nos. 38, 40).

1 Deutsche Bank argues that the court should grant its motion because the foreclosure sale  
2 for less than 5% of the property's fair market value (\$259,000.00) is grossly inadequate and  
3 because Deutsche can establish evidence of fraud, unfairness, or oppression. (ECF Nos. 29, 41,  
4 42).

5 NRS 116.3116 codifies the Uniform Common Interest Ownership Act ("UCIOA") in  
6 Nevada. *See* Nev. Rev. Stat. § 116.001 ("This chapter may be cited as the Uniform Common-  
7 Interest Ownership Act"); *see also SFR Investments*, 334 P.3d at 410. Numerous courts have  
8 interpreted the UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on  
9 foreclosure of association liens.<sup>3</sup>

10 In *Shadow Wood*, the Nevada Supreme Court held that an HOA's foreclosure sale may be  
11 set aside under a court's equitable powers notwithstanding any recitals on the foreclosure deed  
12 where there is a "grossly inadequate" sales price and "fraud, unfairness, or oppression." 366 P.3d  
13 at 1110; *see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 184 F. Supp. 3d 853, 857–58  
14 (D. Nev. 2016). In other words, "demonstrating that an association sold a property at its  
15 foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a  
16 showing of fraud, unfairness, or oppression." *Id.* at 1112; *see also Long v. Towne*, 639 P.2d 528,  
17 530 (Nev. 1982) ("Mere inadequacy of price is not sufficient to justify setting aside a foreclosure  
18 sale, absent a showing of fraud, unfairness or oppression." (citing *Golden v. Tomiyasu*, 387 P.2d  
19 989, 995 (Nev. 1963))) ("*Long*").

20 Here, Deutsche Bank overlooks the reality of the foreclosure process. The amount of the  
21 lien—not the fair market value of the property—is what typically sets the sales price. Further,

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22 <sup>3</sup> *See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1229  
23 (D. Nev. 2013) ("[T]he sale for \$10,000 of a Property that was worth \$176,000 in 2004, and which  
24 was probably worth somewhat more than half as much when sold at the foreclosure sale, raises  
25 serious doubts as to commercial reasonableness."); *SFR Investments*, 334 P.3d at 418 n.6 (noting  
26 bank's argument that purchase at association foreclosure sale was not commercially reasonable);  
27 *Thunder Props., Inc. v. Wood*, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at \*2 (D. Nev.  
28 Nov. 19, 2014) (concluding that purchase price of "less than 2% of the amounts of the deed of  
trust" established commercial unreasonableness "almost conclusively"); *Rainbow Bend  
Homeowners Ass'n v. Wilder*, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at \*2 (D. Nev.  
Jan. 10, 2014) (deciding case on other grounds but noting that "the purchase of a residential  
property free and clear of all encumbrances for the price of delinquent HOA dues would raise  
grave doubts as to the commercial reasonableness of the sale under Nevada law"); *Will v. Mill  
Condo. Owners' Ass'n*, 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness  
standard and concluding that "the UCIOA does provide for this additional layer of protection").



1 Deutsche Bank fails to set forth sufficient evidence to show fraud, unfairness, or oppression so as  
2 to justify the setting aside of the foreclosure sale. Deutsche Bank relies on its repeated assertion  
3 that merely requesting the superpriority amount is sufficient to show fraud, unfairness, or  
4 oppression. However, as discussed in the previous section, the amount due by the date of the  
5 foreclosure sale was set forth in the notice of default and election to sell and, subsequently, in the  
6 notice of foreclosure sale. Rather than tendering the noticed amount under protest so as to preserve  
7 its interest and then later seeking a refund of the difference in dispute, Deutsche Bank allowed the  
8 foreclosure sale to proceed.

9 Deutsche Bank also claims that the foreclosure sale was unfair because the CC&Rs provide  
10 that a sale pursuant to the covenants on the property cannot extinguish a deed of trust so long as  
11 the violations of the covenant were made in good faith and for fair value. (ECF No. 29).

12 However, NRS 116.1104 provides that “[e]xcept as expressly provided in this chapter, its  
13 provisions may not be varied by agreement, and rights conferred by it may not be waived.” Nev.  
14 Rev. Stat. § 116.1104; *see also Bayview Loan Servicing, LLC v. SFR Investments Pool 1, LLC*,  
15 No. 2:14-CV-1875-JCM-GWF, 2017 WL 1100955, at \*9 (D. Nev. Mar. 22, 2017) (discussing the  
16 reasoning in ZYZZX2); *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, 200 F.  
17 Supp. 3d 1141, 1168 (D. Nev. 2016) (holding that an HOA’s failure to comply with its CC&Rs  
18 does not set aside a foreclosure sale, due to NRS 116.1104). Accordingly, language in the CC&Rs  
19 has no impact on the superpriority lien rights granted by Chapter 116.

20 Accordingly, Deutsche Bank’s commercial reasonability argument fails as a matter of law,  
21 as Deutsche Bank failed to set forth sufficient evidence of fraud, unfairness, or oppression. *See*,  
22 *e.g., Nationstar Mortg., LLC*, No. 70653, 2017 WL 1423938, at \*3 n.2 (“Sale price alone, however,  
23 is never enough to demonstrate that the sale was commercially unreasonable; rather, the party  
24 challenging the sale must also make a showing of fraud, unfairness, or oppression that brought  
25 about the low sale price.”).

#### 26 **IV. Conclusion**

27 In light of the foregoing, Deutsche Bank has not provided sufficient grounds for the court  
28 to set aside the foreclosure sale.

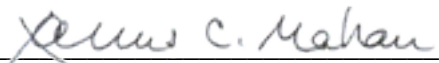
1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Deutsche Bank's motion  
3 for summary judgment (ECF No. 29) be, and the same hereby is, DENIED.

4 IT IS FURTHER ORDERED that SFR's motion for summary judgment (ECF No. 31) be,  
5 and the same hereby is, GRANTED.

6 The clerk is instructed to enter judgment accordingly and close the case.

7 DATED November 14, 2018.

8   
9 UNITED STATES DISTRICT JUDGE